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Norisman bin Rozali v Public Prosecutor

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COURT OF APPEAL (PUTRAJAYA) — CRIMINAL APPEAL NO A-05–207–08 OF 2012
BALIA YUSOF, MOHTARUDIN BAKI AND TENGKU MAIMUN JJCA
23 SEPTEMBER 2014

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Criminal Procedure — Appeal — Appeal against conviction and sentence — Accused person convicted for trafficking in dangerous drugs — Sentenced to death — Whether judgment was non-speaking judgment — Whether possession proven — Whether prima facie case proven — Whether there was sufficient appreciation of defence case — Whether prosecution's witnesses credible — Whether evidence by witnesses corroborated

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The appellant was convicted and sentenced to death for trafficking in dangerous drugs, an offence under s 39B(2) of the Dangerous Drugs Act 1952 ('the DDA'). In the present appeal, the appellant appealed against his appeal against the said conviction and sentence. The issues that arose were whether the judgment from the court below was a non-speaking judgment; whether there was an affirmative finding on possession; whether there was contradiction between witnesses SP6 and SP7; the credibility of SP7; and whether there was sufficient appreciation of the defence case.

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Held, allowing the appeal and setting aside the conviction and sentence:

(1) Nowhere in the judgment did the trial judge make a finding of possession by the appellant. As to trafficking, there was also no finding made as to whether it was a presumed trafficking or one under s 2 of the DDA or more commonly referred to as actual trafficking. The appellant was left in the dark and this was prejudicial to the preparation of his defence. The appellant was entitled to know precisely the case against him and to enable him to decide whether the court had misdirected itself in concluding a prima facie case had been established against him (see para 8).

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(2) The trial judge had merely narrated on the evidence of SP6 and had merely considered the evidence of SP6 without having any regard to the evidence of SP7. There was also a total lack of consideration or evaluation of the evidence of SP7 and on the contradictions. There was a failure of the trial judge to make any finding on the issue of credibility of these witnesses (see para 16).

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(3) The failure of the trial judge was a misdirection. The appellant had been prejudiced in being deprived of the trial judge's reasons in finding a prima

facie case had been established against him. He was denied of his basic right of knowing the facts against him in order for him to prepare his course of defence and to discharge the burden placed on him (see para 28).

[Bahasa Malaysia summary

Perayu disabitkan dan dijatuhkan hukuman mati kerana mengedar dadah berbahaya, kesalahan di bawah s 39B(2) Akta Dadah Berbahaya 1952 ('ADB'). Dalam rayuan ini, perayu merayu terhadap sabitan dan hukuman tersebut. Isu-isu yang berbangkit adalah sama ada penghakiman daripada mahkamah bawahan adalah penghakiman yang tidak jelas; sama ada terdapat keputusan sah atas milikan; sama ada terdapat percanggahan antara saksi-saksi SP6 dan SP7; kebolehpercayaan SP7; dan sama ada terdapat penelitian yang mencukupi terhadap kes pembelaan.

Diputuskan, membenarkan rayuan dan mengetepikan sabitan dan hukuman:

(1) Tidak terdapat di mana-mana dalam penghakiman hakim perbicaraan membuat dapatan milikan oleh perayu. Mengenai pengedaran, juga tidak terdapat dapatan yang dibuat sama ada ia adalah anggapan pengedaran atau satu di bawah s 2 ADB atau lebih biasa dirujuk sebagai pengedaran sebenar. Perayu adalah berhak untuk mengetahui dengan tepat kes terhadapnya dan untuk membolehkannya untuk memutuskan sama ada mahkamah telah tersalah arah terhadap dirinya dalam memutuskan kes prima facie telah dibuktikan terhadapnya (lihat perenggan 8).

(2) Hakim perbicaraan hanya menjelaskan keterangan SP6 dan hanya mempertimbangkan keterangan SP6 tanpa mengambil kira keterangan SP7. Juga terdapat kekurangan pertimbangan atau penilaian keterangan SP7 dan atas percanggahan tersebut. Terdapat kegagalan oleh pihak hakim perbicaraan untuk membuat apa-apa dapatan atas isu kebolehpercayaan saksi-saksi ini (lihat perenggan 16).

(3) Kegagalan hakim perbicaraan adalah salah arah. Perayu telah diprejudis dengan dinafikan terhadap alasan-alasan hakim perbicaraan dalam mendapati kes prima facie telah dibuktikan terhadapnya. Dia dinafikan hak asasinya mengetahui fakta terhadapnya untuk dia menyediakan perjalanan pembelaannya dan untuk melepaskan beban yang diletakkan ke atasnya (lihat perenggan 28).]

Notes

For cases on appeal against conviction and sentence, see 5(1) *Mallal's Digest* (4th Ed, 2014 Reissue) paras 288–371.

Cases referred to

Ahmad Najib bin Aris v PP [2009] 2 MLJ 613; [2009] 2 CLJ 800, FC (refd)
Balasingham v PP [1959] 1 MLJ 193 (refd)
Jaafar bin Abu & Anor v PP [1988] 2 MLJ 363b, SC (refd)
Lee Ing Chin @ Lee Teck Seng & Ors v Gan Yook Chin & Anor [2003] 2 MLJ 97; [2003] 2 CLJ 19, CA (refd)
Mohamed Din v PP [1985] 2 MLJ 251 (refd)
Mohamed Mokhtar v PP [1972] 1 MLJ 122 (refd)
Mohd Jalani bin Saliman & Anor v PP [1997] 5 MLJ 551, HC (refd)
Mraz v R (No 1) (1955) 93 CLR 493, HC (refd)
Murugiah v PP [1941] 1 MLJ 17b (refd)
PP v Mohd Radzi bin Abu Bakar [2005] 6 MLJ 393; [2006] 1 CLJ 457, FC (refd)
R v Immigration Appeal Tribunal, ex p Mahmud Khan [1983] QB 790, CA (refd)
Thong Ah Fat v PP [2011] SGCA 65, CA (refd)
Tunde Apatira & Ors v PP [2001] 1 MLJ 259; [2011] 1 CLJ 381, FC (refd)

Legislation referred to

Court of Judicature Act 1964 s 60
Criminal Procedure Code s 308
Dangerous Drugs Act 1952 ss 2, 37(da), 39B(2)

Appeal from: Criminal Trial No 45A-13 of 2010 (High Court, Taiping)

Afifuddin bin Ahmad Hafifi (Salehuddin Saidin & Assoc) for the appellant.
Aslinda bt Ahad (Deputy Public Prosecutor, Attorney General's Chambers) for the respondent.

Balia Yusof JCA:

[1] The appellant was convicted and sentenced to death for committing an offence under s 39B(2) of the Dangerous Drugs Act 1952 ('the Act'). This is his appeal against the said conviction and sentence.

THE APPEAL

[2] A number of issues were canvassed before us and they may be summarised as follows:

(a) a non-speaking judgment;

(b) no affirmative finding on possession;

(c) contradiction between SP6 and SP7;

(d) credibility of SP7; and

(e) non-appreciation of defence.

[3] Learned counsel for the appellant submitted that the judgment is not a speaking judgment and related to the appellant's second ground of appeal as to the failure of the trial judge to make an affirmative finding of possession, he submitted that the judgment is devoid of any grounds to sustain the learned judge's findings.

[4] Having perused the brief judgment prepared by the learned trial judge, we are unable to conclude as to whether His Lordship had carried out a maximum evaluation of the prosecution evidence before calling for the defence. We wish to reiterate that we are not concerned with the length of the judgment. Grounds of judgment may be extensive or concise depending on the circumstances and the nature of the evidence.

[5] In the grounds of judgment, after having narrated the evidence of SP6, the learned trial judge merely stated:

> Berasaskan keterangan sedemikian, OKT telah diarah membela dirinya bagi pertuduhan yang dihadapinya.

[6] In our view, this will not suffice.

[7] On the narration of the prosecution evidence, this is what the learned trial judge stated at p 4 of the *rekod rayuan Jld* 1:

> SP6 telah mendapat maklumat mengenai pengedaran dadah oleh seorang lelaki Melayu yang menggunakan motokar Proton Saga nombor pendaftaran PHW 7261 daripada seorang tangkapan (SP7). SP6 yang bertugas di Bahagian Siasatan Jenayah Narkotik, Taiping telah mengetuai sepasukan 13 anggota serbuan di tempat kejadian sepertimana dalam pertuduhan. Sebelum itu SP6 telah mengarahkan SP7 buat panggilan telefon kepada lelaki Melayu berkenaan iaitu OKT yang SP7 kenali sebagai 'Die'. Melalui telefon SP7 telah dapat persetujuan OKT untuk membawa dadah ganja sebanyak 1.2 kilogram ke tempat kejadian pada 1.00 petang. Pada jam 1.43 petang, OKT telah tiba ke tempat kejadian dengan memandu motokar Proton Saga no. pendaftaran PHW 7261 dan berhenti di hadapan pondok menunggu bas. Apabila OKT keluar daripada motokarnya dengan memegang 1 beg plastik warna biru dengan tangan kanannya pasukan serbuan polis yang mengendap di situ telah terus serbu dan menangkap OKT dengan memperkenalkan diri mereka sebagai 'Polis'.
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> OKT kelihatan terkejut dan mencampakkan 1 beg plastik biru itu ke atas jalan raya dengan tangan kanannya. OKT telah ditangkap dan SP6 merampas 1 beg plastik itu. Apabila beg plastik itu diperiksa, SP6 mendapati bahawa ianya mengandungi 1 ketulan mampat yang kemudian disahkan oleh ahli Kimia (SP4) sebagai dadah ganja. Daripada motokar tersebut SP6 telah merampas 1 beg yang mengandungi 1 kemeja biru dengan tanda nama 'NORISMAN' di hadapan sebelah kanan kemeja tersebut. Dalam beg itu juga SP6 menjumpai kad pengenalan OKT, 3 ketulan

A mampat dalam balutan plastik yang kemudiannya disahkan oleh ahli Kimia (SP4) sebagai dadah ganja. Juga di atas tempat duduk belakang motokar tersebut SP6 telah menjumpai 1 dompet yang mengandungi kad pengenalan OKT serta 1 penyata gaji OKT daripada Majlis Perbandaran, Kulim bagi bulan April 2010. Akhir sekali SP6 mengesahkan dengan Jabatan Pengangkutan Jalan bahawa B motokar berkenaan didaftarkan di nama OKT. Berdasarkan keterangan sedemikian, OKT adalah di arah membela dirinya bagi pertuduhan yang dihadapinya.

[8] As submitted by learned counsel for the appellant, nowhere in the C judgment did the learned trial judge make a finding of possession by the appellant. And, as to trafficking, there was also no finding made as to whether it was a presumed trafficking or one under s 2 of the Act or more commonly referred to as actual trafficking. The appellant was left in the dark and this is prejudicial to the preparation of his defence. The appellant is entitled to know D precisely the case against him and to enable him to decide whether the court had misdirected itself in concluding a prima facie case had been established against him.

E **[9]** Authorities emphasising the importance of giving reasons as part of due process are in abundance. Depending on the particular facts and circumstances of the case, 'unreasoned' decision may be set aside.

[10] In *R v Immigration Appeal Tribunal, ex p Mahmud Khan* [1983] QB F 790 at pp 794–795 Lord Lane CJ had spoken on the entitlement of the defendant to know the basis of fact upon which the conclusion has been reached by the tribunal as follows:

> A party appearing before a tribunal is entitled to know, either expressly stated by the tribunal or inferentially stated, what it is to which the tribunal is addressing its G mind. In some cases, it may be perfectly obvious without any express reference to it by the tribunal: in other cases it may not. Secondly, the defendant is entitled to know the basis of fact upon which the conclusion has been reached. Once again in many cases it may be quite obvious without the necessity of expressly stating it, in other cases it may not.

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[11] Sharma J in *Mohamed Mokhtar v Public Prosecutor* [1972] 1 MLJ 122 commenting on the absence of reasons in a judgment had this to say:

> It has been said there are no findings of fact and that the learned president has not given his reasons. It is undoubtedly desirable that the learned magistrates and the I learned presidents should when writing their grounds of decision give their findings and the reasons for those findings. It has been suggested that it is mandatory on the part of the learned magistrates and the learned presidents to give such reasons.

[12] The advantage of a speaking judgment needs no emphasis. The trial

court is under a statutory obligation under s 308 of the Criminal Procedure Code to transmit to the appellate court the grounds of decision which convey a reasoned judgment on the facts and the law, not merely the conclusion arrived at, per Ismail Khan J (as he then was) in *Balasingham v Public Prosecutor* [1959] 1 MLJ 193 (see also *Jaafar bin Abu & Anor v Public Prosecutor* [1988] 2 MLJ 363b).

[13] We will not conclude on this issue without referring to the observation of VK Rajah JA in the Singapore Court of Appeal case of *Thong Ah Fat v Public Prosecutor* [2011] SGCA 65 on the judicial duty to give reasons. It states:

> About two centuries ago, Lord Mansfield reportedly gave to a general who had to sit as a judge the following advice: Never give your reasons; for your judgment will probably be right, but your reasons will certainly be wrong: see Lord Campbell, *The lives of the Chief Justices of England* vol 3 (James Cockroft & Co, 1874) at p 481. Today, such advice even from a jurist as eminent as Lord Mansfield, would be regarded as judicial heresy and inimical to sound judicial practice. Judicial decisions that are bereft of reasoning are, of course, impervious to scrutiny and challenge, effectively making judges unaccountable for their decisions. This is plainly unacceptable in any modern society. We note that historically, as the role of juries in fact-finding declined, it has been acknowledged in all mature common law jurisdictions as an elementary principle of fairness that parties are not only to be given a fair opportunity to be heard, but also apprised of how and why a judge has reached his decision.

[14] As we have stated earlier, the learned trial judge had merely narrated on the evidence of SP6. It was further submitted by learned counsel that His Lordship had failed to evaluate the evidence of SP6 in the light of the contradictions of his evidence during examination-in-chief and re-examination. This is in respect of the finding of the '3 ketulan mampat' which he said were in the bag 'ACER' found on the back seat of the car.

[15] SP6 also stated in his evidence that the appellant came out of the car and dropped the plastic bag containing the drugs while SP7 says the police rushed towards the appellant as he was coming out of the car and did not see the appellant throwing the plastic bag. He only saw the police team holding the plastic bag.

[16] In the grounds of judgment in calling for the defence, the learned trial judge merely considered the evidence of SP6 without having any regard to the evidence of SP7. There is a total lack of consideration or evaluation of the evidence of SP7 and on the contradictions as pointed out by learned counsel. We have considered learned counsel's submission on the contradictions in the evidence of SP6 and SP7 and we agree that there was a failure of the learned trial judge to make any finding on the issue of credibility of these witnesses.

[17] It is said that a judge who is required to adjudicate upon a dispute must arrive at his decision on an issue of fact by assessing, weighing and, for good reasons, either accept or reject the whole or any part of the evidence placed before him. He must when deciding whether to accept or to reject the evidence of a witness, test it against relevant criteria. That is judicial appreciation of evidence, (see *Lee Ing Chin @ Lee Teck Seng & Ors v Gan Yook Chin & Anor* [2003] 2 MLJ 97; [2003] 2 CLJ 19). A trier of facts who makes finding based purely upon the demeanour of a witness without undertaking a critical analysis of that witness's evidence runs the risk of having his findings corrected on appeal.

[18] It is incumbent on the part of the learned trial judge to indicate through his judgment his evaluation of the evidence. It is not sufficient to merely say 'I accept' or 'I believe' the evidence of the witness. Reasons and analysis of the evidence must be shown (*Murugiah v Public Prosecutor* [1941] 1 MLJ 17b). In the instant appeal, the learned trial judge did not even say those words but merely narrated the evidence of SP6, instead. Such failure merits appellate intervention.

[19] With regard to the appellant's complain on the learned trial judge's treatment of the defence, we do not find any merits on the contention that there was a failure of the learned trial judge to give proper weight to the defence put forth by the appellant.

[20] The defence of the appellant was briefly summarised by the learned trial judge at p 6 of the *rekod rayuan Jld 1* as follows:

> Dengan ringkas, pembelaan OKT adalah bahawa dia berada di tempat kejadian secara kebetulan kerana sedang mencari SP7 untuk mengambil buah durian di Batu Kurau. Walau pun tidak dapat menghubungi SP7, adik SP7 telah menghubungi OKT untuk mengambil buah. Dalam perjalanan ke Batu Kurau, OKT nampak motovan SP7 di tempat kejadian dan berhentikan motokarnya di hadapan motokar SP7. OKT nampak dalam keadaan bergari dengan seorang lelaki. OKT turun daripada motokarnya untuk bertanya. Mengikut OKT lagi, tiba-tiba dia diserbu oleh pihak polis dan salah seorang daripada mereka membawa bungkusan warna biru seperti gambar P4C dan D. OKT menafikan bahawa dia ada membawa dadah seperti eksibit-eksibit P4C, D, E dan F. OKT juga menafikan dia telah buat temujanji dengan SP7 dan juga menafikan bahawa dia dikenali sebagai 'Die'. Sebaliknya OKT menyatakan bahawa nama panggilannya adalah 'Man'. OKT telah memanggil 2 saksi lain, SD2 dan SD3 dalam kes pembelaan.

[21] We do not wish to elaborate further on the issue and suffice it to say that the learned trial judge, unlike the treatment given to the prosecution's case earlier, had dealt with the defence quite sufficiently in concluding that the defence of the appellant 'tidak meyakinkan dan merupakan penafian kosong yang juga pemikiran terkemudian'. We found there was adequate evaluation

and analysis of the defence evidence in concluding that the defence had failed to cast a reasonable doubt on the prosecution's case. That is evident from pp 7–8 of the *rekod rayuan Jld* 1 where His Lordship had deliberated on the appellant's evidence and the evidence of SD2 and SD3 and making an oblique reference to the evidence of SP7.

[22] In her submission in reply, the learned deputy public prosecutor, Puan Aslinda Ahad urged us to invoke the provisions of s 60 of the Court of Judicature Act 1964 citing *Tunde Apatira & Ors v Public Prosecutor* [2001] 1 MLJ 259; [2011] 1 CLJ 381 and *Ahmad Najib bin Aris v Public Prosecutor* [2009] 2 MLJ 613; [2009] 2 CLJ 800 in support of her submissions.

[23] The learned deputy submitted both the presumption under s 37(da) and s 2 definition of trafficking may be applied to found a case of trafficking, while knowledge can be inferred and there was actual possession of the drugs. She further submitted that no prejudice had been caused to the appellant.

[24] While it is true that we, on our own in hearing this appeal can make our own assessment of the evidence and come to a finding whether or not the evidence vindicates the decision of the trial judge, we are however mindful of the caution given by the Federal Court in *Public Prosecutor v Mohd Radzi bin Abu Bakar* [2005] 6 MLJ 393; [2006] 1 CLJ 457 when referring to *Tunde Apatira*.

[25] On the usage of the proviso to s 60 of the Court of Judicature Act 1964 the Federal Court had given the following reminder:

> We now turn to the invitation to apply the proviso on the basis that it was done in *Tunde Apatira*. That case discussed some of the authorities in which the proviso was considered. *Tunde Apatira* was an exceptional case and this court said so in its judgment. It was an exceptional case because the totality of the evidence at the trial in that case reasonably supported the conclusion that the appellants were in 'possession with mens rea'
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> ...
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> As happens in many criminal cases, *Tunde Apatira* was a case decided on its own peculiar facts. Counsel on both sides of the bar are therefore discouraged from treating it as laying down any new principle.

[26] We are duty bound to take heed of that reminder.

[27] As a general rule this court will, in the normal course of events quash a conviction where there has been a misdirection.

[28] In our considered view, the failure of the learned trial judge as we have adumbrated above is a misdirection. The appellant has been prejudiced in being deprived of the trial judge's reasons in finding a prima facie case had been established against him. He was denied of his basic right of knowing the facts against him in order for him to prepare his course of defence and to discharge the burden placed on him. Was he supposed to cast a reasonable doubt on the prosecution's case or was he also required to rebut the presumption if at all any presumption under the Act was invoked against him? The failure of the trial judge may have caused the appellant to have lost a chance which was fairly open to him to raise a proper defence which may also fairly open to him of being acquitted of the charge. This is a miscarriage of justice (see *Mraz v R (No 1)* (1955) 93 CLR 493 cited in *Mohamed Din v Public Prosecutor* [1985] 2 MLJ 251, *Mohd Jalani bin Saliman & Anor v Public Prosecutor* [1997] 5 MLJ 551).

[29] Having that in our mind, we are unanimously of the view that it would be a travesty of justice to uphold the conviction against the appellant. We found the conviction to be unsafe. The appeal is allowed and we set aside the conviction and sentence imposed by the learned trial judge. The appellant is acquitted and discharged and he is set free.

Appeal allowed and the conviction and sentence set aside.

Reported by Afiq Mohamad Noor